METROPLEX ADMINISTRATION SDN BHD

v.

MOHAMED ELIAS

HIGH COURT MALAYA, KUALA LUMPUR
LOW HOP BING J
[ORIGINATING SUMMONS NO: R1-25-49-93]
15 MAY 1998

ADMINISTRATIVE LAW: *Remedies - Certiorari - Failure by Industrial Court to consider findings of domestic inquiry - Whether relevant factors not taken into account - Whether award ought to be quashed*

LABOUR LAW: *Employment - Grievance procedure - Domestic inquiry - Whether conducted in adherence to rules of natural justice - Whether in compliance with art. 42 of Code of Conduct of Industrial Harmony*

LABOUR LAW: *Employment - Grievance procedure - Domestic inquiry - Right of appeal against decision of domestic inquiry provided for in company handbook - Whether employee should exhaust all remedies available internally first - Doctrine of exhaustion of remedies - Whether application to director-general of industrial relations and proceedings flowing thereafter rendered premature - Whether Industrial Court had no jurisdiction*

The employer, Metroplex, engaged the employee, Mohamed, as a security manager. They dismissed him on four allegations, namely that he was absent without leave from 1 July 1987 to 20 July 1987; that he declared false attendance and misled the management about his duties and responsibilities; that he was unable to perform the job of an assistant security manager by failing to observe company rules and regulations on staff punctuality and movements; and that he was habitually late from 21-31 July and on 10 August 1987.

An inquiry was convened and as the claimant was found guilty on all four charges, he was dismissed. Although appendix E of the Company's Handbook gave the claimant a right to appeal against this decision, he referred the matter to the director-general of industrial relations who in turn directed the dispute to be brought before the Industrial Court. Having found the claimant unjustly dismissed, he was awarded compensation in lieu of reinstatement. Being dissatisfied, the employer applied for *certiorari* to quash the said Industrial Court award. The employer argued that there was impropriety in the manner in which the tribunal came to its decision, contending, *inter alia*, that it had failed to take into account the doctrine of exhaustion of domestic remedies.

Held:

[1] It is necessary for an employer to convene an inquiry to facilitate a proper evaluation of the facts underlying the allegations of the employee's acts of misconduct. Such an inquiry must be conducted in accordance with the rules of natural justice whereby the employee must be informed of the grounds against him and he must be given a chance to answer the allegations.

[2] Looking at the surrounding facts, the employer had meticulously applied and complied with the rules of natural justice during the course of the inquiry. The inquiry had complied with the correct procedure laid down in art. 42 of the Code of Conduct of Industrial Harmony.

[3] The learned chairman of the Industrial Court had failed to consider adequately the evidence and the statements adduced at the board of domestic inquiry and its subsequent findings. Such an approach constituted an error of law *viz*, acting erroneously in law or in jurisdiction, or a combination of both.

[4] Pursuant to the doctrine of exhaustion of domestic remedies, an aggrieved person is required to exhaust all the remedies available under an internal grievance procedure for the settlement of disputes. The employee did not avail himself of the existing appeal procedure and so he had not exhausted this domestic remedy open to him. Accordingly, his application to the director-general of industrial relations under s. 20(1) of the Industrial Relations Act 1967 was premature. It follows that all proceedings flowing from the representations under the said section were equally premature and the Industrial Court, which made the said award, had acted in excess of its jurisdiction.

[Application for certiorari granted; Industrial Court award quashed with costs.]

Case(s) referred to:
Metroplex Administration Sdn Bhd v. Mohamed Elias [1993] 1 ILR 66 ***(refd)***
Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 ***(foll)***
Tan Beng Swee v. Malaysian Airlines System [1981] MLLR 129 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)

Other source(s) referred to:
Code of Conduct of Industrial Harmony, art 42
Industrial Disputes Law in Malaysia, CP Mills, p 121

For the appellant - Philip Chan; M/s Soo Thien Ming & Nashrah
For the respondent - KP Gengadharan; Genga Maha Wong & Co

Reported by M Maheswaran

JUDGMENT

Low Hop Bing J:

Issue

The applicant ("employer") by way of a notice of motion in encl. (11) is applying for an order of *certiorari* to quash Industrial Court Award No. 32 of 1993 handed down on 5 February 1993 ("the award"). The sole issue before me, as was before the Industrial Court, is whether the respondent ("employee") has been dismissed "without just cause or excuse" by the employer.

Facts

The employee joined the employer on 5 January 1985 as an assistant security manager. On 13 August 1987, the employer constituted a board of domestic inquiry to conduct an inquiry against the employee. At the inquiry, four charges were preferred against the employee. The gravamen of these four charges are as follows:

1. Absence without approval of leave from 1 July 1987 to 20 July 1987
2. Declaring false attendance and misleading the management of his duties and responsibilities;
3. Inability to perform the job of an assistant security manager by failing to observe company rules and regulations on staff punctuality and movements; and
4. Habitual lateness from 21 July 1987 to 31 July 1987 and on 10 August 1987.

At the inquiry, the employee was given full opportunity to conduct his defence, examine his witness and cross-examine the employer's witnesses. After due inquiry, the board of inquiry came to the following specific finding:

1. With the exception of 14 to 16 July 1987, the employee was unable to provide concrete evidence to support his presence from 1 to 20 July 1987;
2. In response to the warning letter issued by the employee's superior, the employee furnished a time sheet for the period from 1 to 20 July 1987 to support his whereabouts, the accuracy of which was doubted by the board of inquiry as the facts do not correspond with the records of the witnesses;

3. Although the employee was fully aware of the employer's rules and regulations on staff punctuality and movements, he has chosen not to comply with them; and

4. The punch card showed that the employee was habitually late for work.

By reason of the aforesaid specific finding, the board of inquiry came to the conclusion that all the charges against the employee have been proved and submitted a report for the employer's consideration and decision.

The employer vide letter dated 3 September 1987 addressed to and acknowledged by the employee notified the employee of the result of the inquiry and his dismissal with immediate effect.

Thereafter the employee did not exhaust his right to appeal to the executive director within 14 days from the date of receipt of the letter dated 3 September 1987. There was no allegation that the employer has committed a breach of the rules of natural justice, as indeed the employer has carefully complied with the rules of natural justice.

Apparently, the employee instead made his representations under s. 20(1) of the Industrial Relations Act 1967. Subsequent thereto, on 29 September 1988, the Honourable Minister referred the employee's representations to the Industrial Court for an award.

On 5 February 1993, the Industrial Court drew an inference that the dismissal of the employee was *mala fide*, victimisation and an unfair labour practice. That being the case, the Industrial Court found that the employee was dismissed by the applicant without just cause or excuse, and made consequential orders relating to back wages, or *in lieu* of reinstatement, one month wages for every year of the respondent's service or proportionately, for part of a year ("the award").

The employer filed the present application for *certiorari* to quash the award.

Ground Of Application

The applicant contends that in making the award, the Industrial Court made an error of law and/jurisdiction on the following grounds:

1. The Industrial Court failed to give due consideration to the domestic enquiry which resulted in the dismissal of the employee.

2. The Industrial Court failed to take into account the doctrine of exhaustion of domestic remedies.

3. The Industrial Court's decision was perverse and devoid of any justification; and

4. The Industrial Court was biased.

Submissions For The Respondent

It was submitted for the respondent that the award is not amenable to *certiorari* because the Industrial Court:

(a) did not act without or in excess of jurisdiction or commit any error of law;

(b) did not act in breach of the rule of natural justice;

(c) was not biased in making any rulings or decisions or in coming to any conclusions and had at all times given due consideration to the evidence tendered by the employer;

(d) did not make an award which is perverse and/or devoid of justification.

Decision Of The Court

Finding In The Domestic Inquiry

It is trite law that in cases of dismissal, it is necessary for the employer to adopt a certain procedure for the purposes of carefully inquiring into the facts of an alleged misconduct or a series of misconduct in order to arrive at a decision to dismiss an employee. The procedure for effecting a dismissal calls for the application of the rules of natural justice in that the employee must be informed of the grounds against him and he must be given a chance to answer the allegations.

The accepted practice of carrying out such a procedure is by way of a domestic inquiry. Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied; the employee being given the opportunity to be heard and to present his case; and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse. The rule that a domestic inquiry should be held is after all a rule of the court's own devising: see CP Mills *"Industrial Disputes Law in Malaysia"* p. 121.

In the instant case, there was a domestic inquiry which was held by the employer prior to dismissal of the employee. The notes of the domestic inquiry are annexed as pp. 22-44 in the Affidavit of Koh Guan Swee which is affirmed on 9 July 1993 [encl. (4)]. It can be seen from the notes of proceedings and the documents which appear on pp. 19-21 of encl. (4) that the employee was given the opportunity to call his own witnesses and present his case to the board of domestic inquiry. In the premises, in holding the domestic inquiry, the rules of natural justice have been meticulously applied and complied with.

In the award, although the learned chairman states that "This court will now investigate the case on the basis of the evidence adduced in this court, not unmindful of the statements made at the domestic inquiry and its findings", upon a careful perusal of the notes of evidence adduced before the learned chairman and the grounds of the award, I am of the view that the learned chairman has failed to consider or failed to consider adequately the evidence or statements adduced at the board of domestic inquiry and the finding of the board of domestic inquiry. This approach taken or omission occasioned by the learned chairman constitutes an error of law *viz*, acting erroneously in law or in jurisdiction or a combination of both.

The domestic inquiry has indeed followed the correct procedure, in accordance with art. 42 of the *Code of Conduct of Industrial Harmony ("the Code")* which was jointly agreed upon on 9 February 1975 by the Malaysian Council of Employers' Organisation and the Malaysian Trades Union Congress, with the approval of the Honourable Minister. Article 42 of the Code provides, *inter alia*, for pre-dismissal inquiry with the right to be informed in writing of the misconduct alleged, an opportunity given to an employee to state his case, the right to be represented by his workers' representative or trade union official and where appropriate, a right of appeal. In relation to art. 42, above, Edgar Joseph JR, SCJ in *Said Dharmalingam bin Abdullah v. Malayan Breweries (Malaya) Sdn Bhd*; [1997] 1 MLJ 352, 361 F-G, observed as follows:

> The resemblance between the requirements of art. 42 and the requirements of natural justice is striking. It is noteworthy that s. 30(5A) of the Industrial Relations Act 1967 authorizes the Industrial Court, in making an award, to take into consideration the requirements of the Code. However, these requirements are not absolute and so, there will be cases where it is clear that there would be no point in observing the pre-dismissal procedure. On the other hand, the case of *Khanum v. Mid-Glamorgan Area Health Authority* [1979] ICR 40 (club) showed that where the Employer has observed an agreed disciplinary procedure, it will be difficult to hold that the dismissal was procedurally unfair.

Exhauston Of Domestic Remedies

It is trite law that pursuant to the doctrine of exhaustion of domestic remedies, an aggrieved person is required to exhaust all the remedies available under an internal grievance procedure for the settlement of disputes. Hence, in *Tan Beng Swee v. MAS* (Award 51 of 1981), the Industrial Court observed:

> ... The claimant was legally obliged to observe the rules set out in the Procedure, one of which (rule 24) is that any workman who is aggrieved by the punishment awarded by the Director of Personnel may appeal to the Board of Directors through the General Manager to have the order of punishment reviewed. By this rule, the doctrine of exhaustion of domestic remedies applied. This doctrine was enunciated by the *Privy Council in White & Ors v. Kuzych* [1951] AC 538 and was followed by the then Malaysian Court of Appeal in *Tharmalingam v. Sambanthan* [1961] 1 MLJ 63 and this court in *AT Zavier v. Malaysian Airlines System* (Award 185 of 1981) and there is no reason why I should not follow the established doctrine because if there is a right of appeal for the claimant, that right should first be exhausted. The claimant should not be encouraged to circumvent any of the rules by which he was bound. He should not be permitted to set at nought the rules agreed upon.

In the instant case before me, there is an appeal procedure which appears in Appendix E of the company's handbook wherein the last paragraph reads:

> An employee subject to any disciplinary action after an inquiry shall have the right to appeal in writing to the Executive Director within 14 days from date of receipt of the letter informing him/her of the action taken against him/her.

The employee (respondent) has not availed himself of this appeal procedure and so he has not exhausted this domestic remedy open to him. That being the case, it was premature for the employee to make representation to the director general of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967. All proceedings flowing from the representations under the said s. 20(1) are therefore premature and the Industrial Court which made the said award is acting in excess of jurisdiction, thereby rendering the award capable of being judicially reviewed as it is legally unsupportable.

Conclusion

On the foregoing grounds, I make an order in terms of the employer's notice of motion. *Certiorari* to issue and Award No. 32 of 1993 dated 5 February 1993 is hereby quashed with costs.